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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

FRANK THOMPSON, JR.,

Petitioner,

—VS.—

UNITED STATES OF AMERICA,

Respondent.

MOTION OF THE AMERICAN CIVIL LIBERTIES UNION FOR LEAVE TO FILE AND BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONER'S APPLICATION FOR A WRIT OF CERTIORARI

BURT NEUBORNE
Counsel of Record
American Civil Liberties
Union Foundation
132 West 43rd Street
New York, New York 10036
(212) 944-9800

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF PETITIONER'S APPLICATION FOR A WRIT OF CERTIORARI

The American Civil Liberties Union respectfully moves for leave to file the annexed brief amicus curiae in support of petitioner's application for a writ of certiorari to the United States Court of Appeals for the Second Circuit.

The American Civil Liberties Union is a nationwide, non-partisan organization of over 250,000 members dedicated to the protection of

fundamental liberties guaranteed by the Constitution. One of the basic guarantees of our Constitution assures Americans that they will not be the target of intrusive governmental investigative techniques in the absence of particularized information, subject to effective verification by an independent authority, tending to suggest that the target of the investigation is involved in, or possesses information concerning, a violation of law. When the investigative techniques in question are the traditional ones of search, seizure or arrest, this Court has painstakingly evolved a legal structure designed to shield Americans from arbitrary fishing expeditions based upon subjective considerations which do not rise above the level of hunch. E.g. Delaware v. Prouse,

440 U.S. 648 (1979); Brinegar v. United States, 338 U.S. 160 (1949); Payton v. New York, 445 U.S. 573 (1980). In such traditional contexts, the government must, generally, obtain a warrant from a neutral magistrate upon a showing of probable cause before initiating the intrusive investigative technique. Even in the less structured context of investigative street stops, this Court has required an investigating officer to demonstrate an "articulable suspicion" and not a mere hunch, as a pre-condition to conducting intrusive investigative activity. E.g. Terry v. Ohio, 392 U.S. 1 (1968).

This petition arises out of a non-traditional investigative technique -- the Abscam investigation, pursuant to which selected members of Congress were encouraged by a government informant

and corrupt middlemen to commit an unlawful act while being videotaped by the FBI at a pre-selected location. While the Abscam technique is non-traditional, it is clearly as intrusive as a garden variety search which would have required a warrant and probable cause; and far more intrusive than a street stop which would have required a demonstration of articulable suspicion. In contrast with those more traditional forms of investigation, the Abscam technique is subject to no effective restraints whatever. No effective mechanism existed to assist in selecting the targets; no effective controls existed on the conduct of the investigation. In a very real sense, the investigation, with its extraordinarily intrusive techniques verging on entrapment and its sensitive separation

of powers overtones, unrolled on the basis of the hunches and improvisations of totally unrealiable government informants, corrupt middlemen and the lower echelon law enforcement personnel who work with them. Putting aside the serious separation of powers and entrapment issues raised by the Abscam investigation, it seems clear that if non-traditional investigative techniques such as those used in Abscam are to supplement the traditional law enforcement arsenal, this Court should consider the extent to which the Fourth Amendment and the Due Process Clause require a degree of procedural protection surrounding their use. Specifically, at least the following questions require resolution by this Court:

1) What substantive standard should be met before a law enforcement agency may utilize techniques similar to those used in Abscam in the investigation and detection of crime?

2) What procedures should be required in order to authorize intrusive investigative techniques similar to those used in Abscam?

3) What standards and procedures should exist in connection with the targeting of a specific individual or group for intrusive investigative techniques similar to those used in Abscam?

The current state of the law fails to provide adequate guidance to conscientious law enforcement officials and, because of its lack of precision, virtually invites abuse. Indeed, the conduct of the Abscam investigation itself demonstrates that hunch and subjectivity dominated the process. Accordingly, the American Civil Liberties

Union respectfully moves for leave to file a brief amicus curiae in support of petitioner's application for a writ of certiorari in the hope that the Court will utilize this opportunity to establish badly needed guidelines governing the use of newly evolved investigative techniques similar to those used against the petitioner.

Respectfully submitted,

BURT NEUBORNE
Counsel of Record
American Civil Liberties
Union Foundation
132 West 43rd Street
New York, New York 10036
(212) 944-9800

February 9, 1983

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INTRUSIVE INVESTIGATIVE TECHNIQUES SIMILAR TO THOSE USED IN THE ABSCAM INVESTIGATION MAY NOT BE UTILIZED IN THE ABSENCE OF:

A. Facts or Circumstances Which Reasonably Indicate That the Investigation Will Detect Criminal Activity That is Occurring or Likely To Occur in The Absence of the Investigation;

B. Reliable Facts or Circumstances Indicating That a Specific Target is Engaging, Has Engaged, or is Likely To Engage in the Illegal Activity in Question; and

C. A Determination By An Independent Authority, Preferably a Neutral Magistrate, That the Prerequisites Set Forth in (A) and (B) Exist.

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INTEREST OF AMICUS CURIAE

The interest of the amicus curiae is set forth in the foregoing motion.

STATEMENT OF THE CASE

The petitioner is a former member of Congress who was convicted of bribery (18 U.S.C. § 201 (a)) and conflict of interest (18 U.S.C. § 203 (a)) arising out of the Abscam investigation. The Abscam investigation evolved in three phases. Its initial phase involved a traditional "sting" operation designed to apprehend persons dealing in stolen or contraband property. See generally, Sections III and IV, Report to the Select Committee to Study Law Enforcement Undercover Activities of the Review By Its Counsel of the Confidential Abscam Files of the F.B.I., pp.5-12, August 18 1982.

The principal F.B.I. informant, Mel Weinberg, and local bureau agents escalated the investigation in the fall of 1978 into a general investigation into political corruption in New Jersey. Ibid, p.7; Testimony of William Webster, F.B.I. Undercover Guidelines: Oversight Hearings Before Subcommittee on Civil and Constitutional Rights of the House Judiciary Committee, 97 Cong., 1st. Sess. (G.P.O. Serial No. 18), April 20, 1982, p.20. Finally, in January, 1980, the investigation broadened into a general investigation into Congressional corruption. Ibid, p.11. See also, Webster, Ibid, p.23.

At the initial "sting" level, little or no danger of abuse existed, since the illegal activity was narrowly defined and the targeted parties involved were self-selecting. However, when the

investigation moved to the area of political corruption in New Jersey and, eventually, in the United States Congress, serious issues are raised as to whether a sufficient factual predicate existed to warrant the expanded investigation in general and the choice of specific targets in particular. The decision to zero in on political corruption, first, in New Jersey, and later, in the Congress may or may not have been based on more than hunch and rumor. Certainly, however, the choice of specific targets was seriously flawed, since the principal decisions as to specific targets were made by corrupt middlemen and an unreliable F.B.I. informant. The net effect of the laxness in

selecting specific targets was the improper involvement of innocent persons, such as Senator Pressler and Congressman Hughes, in the investigation. Indeed, it appears that the principal, if not the only control on the choice of specific targets was the F.B.I.'s reliance on the self-interest of corrupt middlemen to produce equally corrupt members of Congress. See, e.g. Senate Select Committee to Study Law Enforcement Undercover Activities, pp.118-120 (Testimony of Irvin B. Nathan); pp. 27-28 (Testimony of Michael Wilson). See generally, Section X, The Use of Unwitting Middlemen as a Technique for Identifying Suspects and Establishing Reasonable Suspicion in Report to the Select Senate Committee By Its Counsel, pp.28-34.

Thus, whatever the merits of the Abscam technique as a means of investigating consensual crime, it seems clear that no effective mechanisms existed to determine whether a sufficiently high probability of criminal activity existed -- either as a general matter, or with reference to specific targets -- to justify its use.

REASONS FOR GRANTING THE WRIT

Although the Court has evolved an elaborate structure to protect individual liberty in the context of searches (including wiretapping), seizures, arrests and street stops, it has provided virtually no guidance in the areas of less traditional investigative techiques, such as the use of undercover agents and pretext crimes. E.g. United States v. White, 401 U.S. 545 (1971); Hoffa v. United States,

385 U.S. 293 (1966); On Lee v. United States, 383 U.S. 747 (1951); Lopez v. United States, 373 U.S. 427 (1963), Hampton v. United States, 425 U.S. 484 (1976); United States v. Russell, 411 U.S. 423 (1973). The net result has been the growth of a highly intrusive investigative technique with virtually no controls on its use. In the Abscam case, the technique involved, not only the use of undercover agents and pretext crimes, but the sound and video recording of targets. When, amicus submits, an investigative technique achieves such a level of intrusiveness, this Court should not ignore the capacity of abuse latent in its misuse. Law enforcement personnel at every level now have carte blanche to engage in intrusive undercover activity reaching the verge of entrapment with no judicial controls.

This Court should grant the petitions for certiorari arising out of the Abscam convictions and enunciate the necessary substantive and procedural rules to permit innovative law enforcement activity to flourish without endangering basic Fourth Amendment values.

In fact, such rules are relatively uncomplicated and generally accepted. First, the Court should recognize that the Fourth Amendment and the Due Process Clause impose a degree of restraint on the use of intrusive investigative techniques. Second, the Court should reiterate that such techniques cannot be used in the absence of facts or circumstances which reasonably indicate that they will detect criminal activity which is occurring or is likely to occur in the absence of the investigation. Third, the Court

should admonish that such techniques cannot be used against a specific target in the absence of particularized information linking the target to criminal activity. Finally, the Court should insist upon a procedural mechanism to assure that substantive standards governing the use of such techniques are being respected

Such a set of Fourth Amendment guidelines would impose no restrictions on legitimate law enforcement activity, while providing badly needed protection against arbitrary or bad faith investigations. Amsterdam, Perspectives on the Fourth Amendment, 58 U. Minn. L.Rev. 349, 406-09 (1974).

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted

BURT NEUBORNE
Counsel of Record
JERRY BERMAN
American Civil Liberties
Union Foundation
132 West 43rd Street
New York, New York 10036
(212) 944-9800